(3)

No. 89-257

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RRI REALTY CORP.,

Petitioner,

vs.

THE INCORPORATED VILLAGE OF SOUTHAMPTON, ROY L. WINES, JR., MAYOR, ORSON D. MUNN, JR., PAUL PARASH, CHARLES F. SCHREIER, JR., and RICHARD L. FOWLER, Constituting the Board of Trustees of the Village of Southampton, SHERBURNE BROWN, COURTLAND SMITH, VICTOR FINALBORGO, JOHN WINTERS and MORLEY A. QUATROCHE, Constituting the Board of Architectural Review of the Village of Southampton, and EUGENE R. ROMANO, the Building Inspector of the Village of Southampton,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT THE INCORPORATED VILLAGE OF SOUTHAMPTON BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Second Circuit correctly held that an applicant for a building permit had no entitlement to the permit so as to establish a property interest protected by the Fourteenth Amendment, where, under local law, the Architectural Review Board had broad discretion to deny that permit and where the applicant had already constructed the building for which it sought a permit in conceded violation of the local building code.

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IN THE
SUPREME COURT OF THE UNITED STATES

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RRI REALTY CORP.,

Petitioner,

-against-

THE INCORPORATED VILLAGE OF
SOUTHAMPTON, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

Petitioner RRI Realty Corp. ("RRI"), the owner of a mansion in the Incorporated Village of Southampton ("the Village"), brought this civil rights action in August 1984 claiming that the Village's refusal to grant it a building permit for a portion of the house violated RRI's due process and equal protection rights pursuant to the United States and New York

State Constitutions and 42 U.S.C. §1983.[1] Petitioner seeks to overturn the decision of the Court of Appeals for the Second Circuit, which found that petitioner had no property right to the permit and therefore was not deprived of property without due process. The Circuit Court reversed the judgment of the District Court entered against the Village in the amount of $2.7 million, following a jury trial. Petitioner's writ should be denied because the Second Circuit's decision is

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[1] Petitioner did not pursue its equal protection claim at trial. Petitioner also sought declaratory relief that the Village's zoning ordinance, which limits the height of buildings to thirty-five feet, is unconstitutional as well as the definition of height in the zoning law. Petitioner also claimed that the Architectural Review Board ("ARB") itself was unconstitutional as based upon an improper and overbroad delegation of authority. After trial, the district court rejected these claims and they are not pursued in this petition.

clearly in accord with the precedent established by this Court.

A. Statement of Facts

Respondent RRI, the owner of a large mansion located in the Village of Southampton, brought this civil rights action claiming that the Village's refusal to grant a building permit for a portion of the mansion deprived RRI of its alleged constitutional rights. (A. 42-66.)[2] RRI asserted that this refusal was based on uncomplimentary rumors circulating in the community about Barry Trupin ("Trupin"), RRI's principal, which allegedly caused

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[2] References to "(T.)" are to the Trial Transcript pages,"(A.)" are to the Joint Appendix, "(E.)" are to the Exhibits and Exhibit Letter references are to over sized exhibits and photos, "(Pet. App.)" are to the Petitioner's Appendix to the Petition for Writ for Certiorari.

Village officials to bow to community pressure to deny it a building permit in violation of its alleged constitutional right to a permit.

The undisputed evidence at trial, however, demonstrated that, beginning in 1980, RRI knowingly and willfully built this house without a proper building permit and in violation of the height limitation of the Code of the Village of Southampton (the "Code") and in violation of a prior height variance which it had been granted by the Zoning Board of Appeals ("ZBA"). (T. 413-14, 545, 925-26, 944, 945, 952, 966, 1398, 1405-10, 1426.) RRI did not claim that these admitted violations were the result of an innocent mistake. On the contrary, RRI hired a licensed architect and licensed engineer to supervise the construction, both of whom admitted they were familiar with the

Code's requirements and knew that RRI needed but did not have a building permit and that the construction violated the height restrictions of the Code and the variance granted. (T. 925-26, 944, 966, 1312-13, 1315, 1392, 1396, 1426.)[3] Moreover, RRI's knowledge of the Code's height limitation was confirmed by the fact that RRI had applied for a variance to exceed the height limitation in 1980. (T. 407; E. 20.)

In 1979, when RRI purchased the house, known as the DuPont mansion, it was in a state of disrepair and Trupin hired an architect and engineer to supervise some minor renovations and construction

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[3] Indeed, one cupola which was constructed over 25 feet above the maximum height permissible (Def. Exh. V(4)) was built in part out of wood so that it could be easily torn down if the Village ever ordered RRI to do so. (T. 869, 955, 1457.)

work. (T. 1312-13, 1315, 1433.) Both the architect and engineer had worked on other projects in the Village and were fully familiar with the provisions of the Code which govern construction in the Village. (T. 925-26, 944, 1394-95.) The Code requires that building permits be obtained before commencement of any construction and provides that construction without a permit should be shut down immediately. (T. 944, 966, 1396, 1426.) Despite this knowledge, RRI, from 1980 and continuing until May 1984, when the Building Inspector issued a stop work order, proceeded to build the house without a building permit and in violation of the Code. (T. 545, 944-45.)

In November 1980, RRI applied for and received a building permit for a kitchen renovation. The application did not seek permission to do any work other than

renovation of the kitchen, nor did the permit issued provide for it. (E. 48, E. 49.) Although originally intending to renovate only the kitchen, Trupin soon decided to embark on a course of far more extensive and elaborate work. (T. 1315.) Advised by the architect and engineer that the construction plans did not comply with the Code, RRI applied to the ZBA for a height variance. (T. 407, 935; E. 20.) Although RRI requested the variance for aesthetic reasons with no attempt to show the "practical difficulty" or "unnecessary hardship" required by the Code, the ZBA nonetheless granted a partial height variance to RRI.

Thereafter, however, RRI did not apply for any building permit beyond the one previously obtained for the limited purpose of the kitchen renovation. Nonetheless, for a period of three and one

half years, until May 1984, when a stop-work order was finally issued, RRI proceeded with construction and renovations without a permit and in excess of the height permitted by the Code as well as by the 1980 variance. During this period approximately 10,000 square feet were added to the mansion, including a new north wing, roof, solarium, cupola and new chimneys. All of this construction was done by RRI with the full knowledge that it was required to obtain a permit before commencing construction and that the construction violated the Village's zoning laws. As early as July 1980, the Building Inspector advised RRI that a permit was required for all construction. That advice was confirmed by RRI's engineer in a letter to the Building Inspector. (T. 413-14, 416-17, 1398; E. 29.) Further, during the entire period of construction,

RRI ignored repeated requests by the Building Inspector, both oral and in writing, that RRI file for a permit, and continued the work unabated without a permit. (T. 403, 416-17.)

Finally, in May of 1983, RRI appeared before the Architectural Review Board ("ARB") to seek its approval necessary to obtain a permit. The ARB approved the plans submitted, noting that a new variance would be required for the plans, but no application for a building permit had been filed at that time. (E. 13; T. 170, 459.) RRI knew that even with the ARB approval, no permit could be issued without a new variance from the ZBA. (T. 459, 1432.)

Following the ARB approval, the Building Inspector continued his repeated requests of RRI to file for a building permit both in conversations with the

architect and engineer and in written requests. (T. 416, 424.) Finally, under threat of a stop work order, RRI filed for a second variance in September 1983. (E. 27; T. 1411.) Then, RRI proceeded to request adjournments of the ZBA hearing, which did not take place until January 1984, and did not conclude until April 1984 when RRI submitted certain requested information to the ZBA. (T. 1291.) During this entire period, construction continued unabated and by April the house had been built beyond the height allowed by the 1980 variance. (T. 954-55.) This intentional flouting of the law was plainly intended to present the Village with a fait accompli which would force the Village to accept what had been illegally done.[4]

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[4] RRI offered no adequate explanation for its illegal conduct. RRI's architect, when asked by the ZBA how the construction

(Footnote continued)

While the application for the second variance was pending before the ZBA, the Building Inspector again threatened to issue a stop work order unless RRI applied for a building permit. (T. 428; E. 35.) Again under threat of a stop work order, RRI finally filed an application for a permit. (E. 254.) There is no dispute that a building permit could not be issued based upon the plans approved by the ARB in May 1983 unless and until the ZBA granted RRI a new variance. Therefore, RRI and the Building Inspector devised a plan to divide the permit application into three stages: stage one was the area

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could have progressed so far with no permit and in violation of the height restrictions of the Code, replied that no application for a variance was made because "if we were to stop and do that continuously it could have been very encumbering to the owner". (E. 36.)

covered by the kitchen permit; stage two was that portion of the house constructed within the limits of the Code; and stage three was the portion of the construction which violated the Code. (Pet. App. 5.)

Although the Building Inspector suggested that a stage two application might be granted, he also made it clear that RRI was required to obtain the ARB's approval to issue such a permit and that the Building Inspector did not have the authority to grant that approval. (T. 403, 1439.) Thus, the plans were resubmitted to the ARB only for stage two. However, the stage two plans were incomplete since the stage three area, a significant portion of the house, was removed, including the roof, one side of the house and an entire wing. (Pet. App. 6.)

The Building Inspector discussed the stage two plan with the ARB in April 1984.

However, the stage two plan, unlike the complete plans submitted to the ARB in May, 1983 were incomplete. The ARB was thus unable to evaluate RRI's design as it was required to do pursuant to the Code. Further, the variance application was still pending before the ZBA, and neither the ARB nor RRI knew what alterations would be made to the house design if RRI's application was denied. (T. 158-59.)[5] Accordingly, the ARB did not approve the application.

In fact, the ARB had never approved a partial house plan, nor had any person -- other than RRI -- ever done substantial

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[5] In fact, the ZBA denied RRI's application in May 1984. This decision was unsuccessfully challenged by RRI in an Article 78 proceeding brought in Supreme Court. RRI Realty Corp. v. Hattrick, 132 A.D.2d 558, 517 N.Y.S.2d 284 (2d Dept. 1987).

construction and renovation without first obtaining ARB approval and a building permit. (T. 172.) Thus, when it became apparent that no partial permit could be issued, the Building Inspector issued a stop work order in May 1984. Notwithstanding that stop work order and RRI's complaints about it, RRI continued with construction, as both RRI's architect and engineer conceded at trial. (T. 985-86, 1008-09, 1473.) Other uncontested evidence also established that extensive construction continued in flagrant violation of the stop work order. RRI's books and records reflected more than $2.1 million expended on construction during the two year period that the stop work order was in effect. (T. 2064; E. 251, E. 260; Pltf. Exhs. 51(e), (f), 52(c), (d), (e), (f), (g).)

B. Legal Proceedings

On June 1, 1984, RRI brought an Article 78 proceeding in Supreme Court, Suffolk County, New York against the Village's Building Inspector (to which the ARB was subsequently added as an indispensable party), challenging the Building Inspector's decision not to grant RRI the partial stage two permit. In its decision which granted the petition, the court found that the ARB had exceeded its jurisdiction by considering the fact that RRI's plans violated the zoning code; the ARB was to consider the plans only from an aesthetic perspective and had no authority to consider the zoning violations. Nothing in the opinion indicates whether the petition would have been denied had the ARB given as its sole reason the fact that it had been presented with partial plans, which were inappropriate for

consideration from an aesthetic perspective. The court also determined that by the time of the Article 78 proceeding, the ARB was in violation of the Code provision requiring the ARB to hold a public hearing within thirty days of its receipt of the application. Since the thirty day period had expired, RRI was deemed entitled to the stage two permit. Although an appeal was taken from the order, it was subsequently dismissed as moot after the Village, in accordance with the order of the State Court, issued the permit to RRI.

In August 1984, RRI brought this action in the United States District Court for the Eastern District of New York, naming as defendants the Village, the Board of Trustees, the ZBA, the ARB and the Building Inspector. Counts one and three, which went to the jury, alleged

that the Village violated RRI's due process and equal protection rights pursuant to the United States and New York State Constitutions and 42 U.S.C. §1983 on the theory that the Village deprived RRI of its property. The trial resulted in a verdict for RRI in the amount of $1.9 million to which the trial judge added $762,970.36 in attorneys' fees. On appeal, the Court of Appeals for the Second Circuit reversed and remanded with directions to enter judgment for defendants, holding that RRI had no protectable property interest in the partial building permit. The Court found that the broad discretion vested in the ARB to act upon the permit application precluded RRI's claim of entitlement to the permit. Plaintiff's petition for rehearing and rehearing en banc was denied.

ARGUMENT

I

THE SECOND CIRCUIT CORRECTLY HELD THAT RRI HAD NO PROPERTY RIGHT TO THE STAGE TWO PERMIT

A. The Standard Employed by the Court

Petitioner argues that the Second Circuit decision misconstrues this Court's decision in Board of Regents v. Roth, 92 S.Ct. 2701 (1972) and "adds to the substantial confusion which exists among the circuit courts." (Petitioner's Brief "Pet. Br." at 9.) These contentions are without merit.

The Second Circuit's decision holding that RRI did not have an entitlement to the stage two permit sufficient to constitute a property interest protected by the Due Process Clause is in accord with this Court's decisions in Roth and Perry v. Sindermann, 92 S.Ct. 2694 (1972), and with the Second Circuit post-Roth

cases which have considered due process claims arising from the denial of applications for proposed land use. Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54 (2d Cir. 1985); Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986); Dean Tarry Corp. v. Friedlander, 826 F.2d 210 (2d Cir. 1987); See also, Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524 (1st Cir. 1983).[6] As the Second Circuit observed in this case: "[i]n this Circuit, our post-Roth cases considering a landowner's claim of a due process violation in the denial of an application for regulation use of his land have been

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[6] In view of its decision, the Second Circuit did not consider the Village's contentions that the denial of the permit did not violate due process and was not the result of any unconstitutional policy that would give rise to municipal liability under Section 1983.

significantly influenced by the Roth 'entitlement analysis'". (Pet. App. 13.)

In Roth, this Court addressed the specific issue of whether a decision not to rehire a non-tenured assistant professor infringed on his Fourteenth Amendment rights. In its analysis of the property interests protected by procedural due process, this Court stated that such interests "extend well beyond actual ownership of real estate, chattels or money," but simultaneously recognized that such rights are not limitless. Rather, the Fourteenth Amendment's procedural protection of property safeguards

> the security interests that a person has already acquired in specific benefits.... To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

92 S.Ct at 2708-2709 (emphasis added).

This Court explained that such property interests are not created by the Constitution, but rather by independent sources, such as state laws or agreements which support claims to entitlement Board of Regents v. Roth 92 S.Ct. 2709. Accordingly, in Roth, the professor's "property interest" in reemployment could only have been created by the terms of his employment contract. Since that contract made no provision for his rehire, the decision was entirely within the University's discretion. Thus, with no "legitimate claim of entitlement" to reemployment, Id. at 2709, the professor had no property interest in such reemployment susceptible to Fourteenth Amendment protection.

The Second Circuit has used the Roth "entitlement" analysis in considering landowners due process claims. In Yale

Auto Parts Inc. v. Johnson, 758 F.2d 54 (2d Cir. 1985), the Second Circuit, relying upon Roth, formulated the test in such actions to be whether "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted." Yale 758 F.2d at 59. In Yale, the Court found that a landowner, whose application for a certificate of location approval had been denied, thereby precluding him under Connecticut law from using his property for a junkyard business, had no legitimate claim of entitlement to the certificate because the licensing authorities had discretion in the issuance of the requested permit. The Court found that the landowner's expectation that the license would be granted, similar to the professor's "abstract concern in being rehired" in

Roth, 92 S.Ct. at 2710, did not amount to a property right entitled to due process protection under §1983.

Again, in Dean Tarry Corp. v. Friedlander, 826 F.2d 210 (2d Cir. 1987), the Second Circuit relied upon the fact that broad discretion was vested in the local planning board to reject the contention of a real estate developer that the denial of his municipal site development plan constituted a deprivation of property without due process. The broad discretion vested in the planning board prevented the developer's expectation of success from rising to the level of a property right meriting protection under the Fourteenth Amendment.

The standard that has evolved in Second Circuit post-Roth land regulation cases has been uniformly applied. It requires the court to examine, as a

threshold matter and with reference to local laws, whether there is a certainty or very strong likelihood that a permit or other application will be issued. The application of this test necessarily focuses upon the degree of discretion enjoyed by the issuing authority. The opportunity of the issuing authority to exercise its discretion to deny a request will defeat a party's claim of legitimate entitlement to the permit, and thus any claim of a property interest sufficient to warrant constitutional protection.

B. Application of the Standard To This Case

The standard developed by the Second Circuit subsequent to Roth and applied in Yale and Dean Tarry was used in this case. Indeed, the court was unanimous in

agreement upon the standard employed.[7] Thus, petitioner was required to prove that it had a legitimate claim of entitlement to the permit absent the alleged due process violation. RRI did not do so in this case. As the Second Circuit found, RRI could not have had a certainty or strong likelihood of obtaining the permit since, under local law, the ARB had broad discretion in the approval process.[8]

RRI contends it was entitled to a stage two permit based upon the section of the Code which provides for the issuance of a permit if the ARB fails to hold a hearing within thirty days as it did in

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[7] The dissenting judge only disagreed with the majority's application of that standard to the facts of this case. (Pet. App. 34.)

[8] Indeed, RRI alleged, in Count 5 of its Complaint, that the ARB's discretion was so broad as to be unconstitutional.

this case. However, that technical failure did not give rise to a Constitutional property right. As the Second Circuit found, prior to the thirty day period there was no entitlement to the permit.

> RRI's claim to the permit as a matter of constitutional law, cannot be fragmented into two claims, one subject to the ARB's discretion within thirty days and one subject to a mandatory duty to issue after thirty days. The ARB's discretion to deny the permit during the thirty-day interval deprived RRI of a property interest in the permit, regardless of how unlawful under state law the ultimate denial may have been. (Pet. App. 18-19.)

There is no fault in the Second Circuit's analysis. Whatever rights may arise to judicial review of administrative action by an official's failure to act promptly, or from a misreading of the Code by officials who believed a hearing was unnecessary, these errors do not and

should not establish a constitutional property right. No one can have a legitimate expectation based upon state law that officials will misread or misapply the Code and no legitimate claim of entitlement can arise from such circumstances. Further, the Second Circuit did not fail to recognize that "the passage of time alone may give rise to property rights" as petitioner contends (Pet. Br. 11-12), but rather found that in this case the passage of time did not confer such rights on RRI.[9]

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[9] RRI's citation to Roth and Evans v. City of Chicago, 689 F.2d 1286 (7th Cir. 1982), rev'd on reconsideration 873 F.2d 1007 (1989) add nothing to its argument. Petitioner apparently misconstrues the holding and analysis in Roth. That case did not determine that tenured professors' property rights are automatically created by the passage of time. Nor did the Court in Evans find that a judgment creditor's right to payment "becomes a property right under Illinois law" after the expiration

(Footnote continued)

Nor did the Second Circuit fail to give "the required deference to state law". (Pet. Br. at 11.) The Court relied upon the wide discretion vested in the ARB under the Code and found that several reasons existed to deny RRI's application. (Pet. App. 18.)[10] Under local law, there could be no certainty or very strong

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of time. (Pet. Br. at 12) Indeed, the Court specifically noted that the plaintiff's property interest in the award arises when the judgment is no longer subject to modification or review, Id. at 1296, and is unrelated to any delay (e.g., passage of time) in payment beyond the time permitted by statute. In any event, the decision in Evans was reversed so that Petitioners citation to it is entirely inapposite.

10 RRI's argument that the ARB's discretion to approve plans is "irrelevant...to the official with the duty to issue the permit" is nonsense. (Pet. Br. at 12) Indeed, under the Code that official, the Building Inspector, could not approve the issuance of a permit without the ARB's approval.

likelihood that Village officials would have granted RRI's application. (Pet. App. 17.)[11] The Village had never before approved a partial permit. (Pet. App. 18.) Further, it is undisputed that the structure violated the height limit in the zoning ordinance that had been granted at the outset of construction. (Pet. App. 18.) Consequently, there was no possibility that a permit would be issued since the Code does not provide for issuance of either a partial permit or a permit where the plans would violate the Code. Section 116-37A(2)(b) expressly provides that "[n]o building permit shall

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[11] Although RRI contends that the jury found to the contrary, "[the Jury's] attention had been improperly focused primarily on the probability that the permit would be issued without adequate consideration of the discretion enjoyed in the issuing authority". (Pet. App. 19.)

be issued...unless the plans and intended use indicate that such building or structure is designed and intended to conform in all respects to the provisions of this Chapter" (emphasis added). This language, which requires that the entire plan comply with the Code, precludes both the issuance of partial permits and permits for structures or plans with zoning violations. In this case, not only were the plans not in compliance with the Code, but also the building which had already been constructed was in violation of the Code.[12] As the Second Circuit

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[12] Were RRI correct in its analysis that a partial permit could be issued, every applicant for a building permit, no matter how violative the plans were of the zoning code, would have a property right to a partial permit, because there would always be an element of the plans that did not violate the zoning code.

found, "it was surely not a certainty nor a clear likelihood that state law would later be construed to require issuance of a permit notwithstanding that zoning non-compliance". (Pet. App. 18.) In fact, the ZBA later rejected RRI's application for a further variance and the state courts denied relief. Furthermore, the Code provides that a building permit must be obtained for construction and that if a permit is not obtained a stop work order shall issue. Sections 116-37A(2)(b) and A 119-6. In sum, the Second Circuit properly considered and applied the appropriate local laws in conformance with this Court's decision in Roth.

II

NO CLARIFICATION IS NEEDED ON THE EFFECT OF OFFICIAL DISCRETION ON THE AVAILABILITY OF DUE PROCESS PROTECTION

Petitioner contends that the federal courts are in need of "unifying direction" on the effects of official discretion on the availability of due process protection.[13] None of the cases cited by

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[13] Petitioner also suggests that the standards applied in the courts for due process protection in the issuance of land use permits "vary dramatically". (Pet. Br. at 14.) However, the cases cited do not support that contention. Chiplin Enterprises Inc. v. City of Lebanon, 712 F.2d 1524 (1st Cir. 1983) (improper motivation is insufficient to raise claim without allegation of deprivation of specific constitutional right); Bello v. Walker 840 F.2d 1124 (3d Cir.), cert. denied, 109 S.Ct. 134 (1988) (cites Chiplin favorably and finds due process violation must be based upon claim that decision had no relationship to any legitimate governmental objective); Shelton v. City of College Station, 780 F.2d 475 (5th Cir.), cert. denied, 477 U.S. 905 (1986) ("federal judicial interference with a state zoning board's quasi-legislative decisions

(Footnote continued)

petitioner supports its claim. Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986); Parks v. Watson, 716 F.2d 646 (9th Cir. 1983); RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911 (2d Cir. 1989); Webster v. Doe, 108 S.Ct. 2047 (1988). Indeed, the cases are entirely consistent.

Petitioner cites Sullivan and Webster for the proposition that discretion is not determinative of the existence of property interests. Neither case supports such a proposition. In Webster, this Court held that the CIA Director's discretion to terminate employees was limited to "those determinations specifically identified by Congress as 'committed to agency

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. . . is proper only if the governmental body could have had no legislative reason for its decision") (citations omitted) (Id. at 483).

discretion by law'". Therefore, Webster only found that matters outside the Director's discretion, including constitutional claims, could be asserted unless specifically committed to the Director's discretion by statute. Nor did the Sullivan court hold that the discretion of an issuing authority to grant or deny a land use application is irrelevant to the due process analysis. Rather, the court found the issue of discretion to be critical to the analysis, and remanded the case for further proceedings regarding the scope of the official's authority. In Parks v. Watson, the issue of discretion was also relevant to the due process analysis. However, in Parks, pursuant to the local statutes, the issuing authority had virtually no discretion in its decision to grant or deny the particular application at issue.

Thus, in each of the cases cited by RRI, the courts looked to the particular statutory scheme to determine the scope of the discretion and its effect upon the due process claim. It was the varying statutory schemes which controlled the different results. Although RRI contends that the Second Circuit has created a different standard, in fact the same analysis was employed by the Second Circuit in this case. That is, the court concluded "based primarily on an assessment of the powers of the ARB as they pertain to the undisputed facts of this case" that RRI had no entitlement to the stage two permit sufficient to invoke the protection of the Due Process clause. (Pet. App. 19.) Thus far from being unclear or an abandonment of its prior decisions, the decision in RRI simply reemphasized the importance of examining

the degree of discretion granted the issuing authority, to determine whether the decision to deny a permit or other application could have been based on an exercise of that discretion.

CONCLUSION

The standard used by the Second Circuit in this case, as in all its post-Roth land use due process cases, is based specifically upon this Court's decision in Roth and properly construes that decision, contrary to petitioner's contention. Nor is there "confusion among the circuits as to its meaning" (Pet. Br. at 12), which needs to be clarified by the Court's review of the Second Circuit's decision in this case. This case, in which the ARB was vested with the broadest possible discretion in the issuance of building permits and in which the petitioner violated numerous provisions of the local zoning law such that its project could concededly have been shut down at any time by the Village, is not a case involving any important question of law which needs

review by this Court. Therefore, RRI's Petition should be denied.

Dated: September 20, 1989

Respectfully Submitted,

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